CHI LIUNG HOLDINGS SDN. BHD.

v.

NG PYAK YEOW

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[ORIGINATING SUMMONS NO. 25 - 23 OF 1993]
21 JULY 1994

COMPANY LAW: Applicant claiming for outstanding arrears in rental from company - Company wound-up prior to application by applicant - Whether applicant entitled to forfeit rental deposit toward payment of arrears - Whether applicant could claim arrears from liquidator - Rules 79 & 86 Companies (Winding-up) Rules 1972 - Whether applicant was a secured creditor - Section 4(1) Civil Law Act 1956, s. 2 Bankruptcy Act 1967 - Whether leave of Court required to commence present proceedings - Whether application properly before the Court - Section 276(3) Companies Act 1965 -Consideration of ss. 108, 223, 224 & 293 Companies Act 1965.

STATUTORY INTERPRETATION: Bankruptcy Act 1967, s. 2 - "secured creditor", "property".

This was an application by the applicant/landlord for payment of outstanding arrears of rental from the respondent/liquidator of Rich's Supercentre Sdn Bhd (the company) which rented the premises of the applicant by a tenancy agreement dated 17 November 1978 for a term of three years. Pursuant to the tenancy agreement, the company was given the option to purchase the premises but upon failing to receive any response from the company, the applicant issued a notice to vacate on 10 June 1989. At the time the notice was given, a petition to wind-up the company had already been filed on 15 May 1989 and the winding-up order was subsequently made on 7 December 1989. The liquidator surrendered the premises to the applicant on 19 December 1989 and by way of notice dated 7 November 1989, the applicant claimed the arrears of rental at double the rate after deduction of the rental deposit.

The issues before the Court were whether the applicant was a secured creditor, whether the applicant was entitled to forfeit the deposit of RM90,000 toward payment of the arrears of rental and whether the applicant could claim for the arrears of rental from the liquidator by way of this application.

Held:

[1] According to s. 4(1) of the Civil Law Act 1956, bankruptcy rules shall apply to a winding-up of any company under any law from time to time in force. Under s. 2 of the Bankruptcy Act 1967, "secured creditor" means "a person holding a mortgage, charge or lien on the property of the debtor...as a security for a debt due to him from the debtor..." and "property" under the same section, "includes money,...". As the sum of RM90,000 was a deposit under the tenancy agreement, it could not properly come within the meaning of mortgage, charge or lien and therefore the applicant could not be considered as a "secured creditor". In that event the applicant did not come within s. 108 of the Companies Act 1965 (the Act).

[2] As the disposition of the deposit was made after the commencement of the winding-up, such disposition was void unless the Court ordered otherwise. In the circumstances the applicant had no right to forfeit the deposit as to do so would amount to undue preferential payment to creditors under s. 293 of the Act. Likewise, s. 224 of the Act also provided that any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up by the Court shall be void.

[3] The claim for the arrears of rental at double the rent would amount to a claim for damages for breach of contract which made the applicant a creditor. In that event the applicant should be in the same rank as any other creditor and any payment to it would be considered as payment to a preferential creditor. The applicant, as provided by r. 86 of the Companies (Winding-up) Rules 1972 (the Rules) was not prejudiced nor was its rights as landlord affected as it could claim payment from the liquidator for the arrears of rental like any other creditor by proving its debt as provided by r. 97 of the Rules.

[4] This originating motion was filed after the winding-up order was made by the Court and thus would require leave of the Court under s. 226(3) of the Act. As the section had not been complied with, this application was not properly before the Court and should therefore be struck out.

[Application dismissed with costs].

Legislation referred to:
Civil Law Act 1956, s. 4(1)
Bankruptcy Act 1967, s. 2
Companies Act 1965, ss. 108, 223, 293, 224, 226(3).
Companies (Winding-Up) Rules 1972, rr. 79, 86

For the applicant - G.T Rajan; M/s. G.T Rajan & Co.
For the respondent - Ong Ban Chai; M/s. Ong Ban Chai & Co.

JUDGMENT

Haidar bin Mohd. Noor J:
In this originating motion, Chi Liung Holdings Sdn. Bhd., applicant/landlord prays for an order that -

(a) The respondent/liquidator, Ng Pyak Yeow do pay the applicant/landlord, the sum of RM339,000 being the outstanding arrears of rental due to the applicant;

(b) Interest at 8% per annum from the date of default to date of realisation;

(c) Costs.

It is supported by the affidavit of Tan Sing Chai the applicant's company secretary. This originating motion was filled on 16 August 1993.

Ng Pyak Yeow, the liquidator was appointed for Rich's Supercentre Sdn. Bhd. (formerly know as G.W. - Rich's Supercentre Sdn. Bhd.) (in liquidation) which was wound up on 7 December 1989 (see exhibit TSC-4 in encl. 3).

Background facts

Rich's Supercentre Sdn. Bhd. ("the company") rented the premises described as Nos, 1-21, Jalan Temoh, 41400 Klang, Selangor Darul Ehsan ("the premises") from the applicant at the rate of RM30,000 per month and car park at the rate of RM3,000 per month. A tenancy agreement was executed between the parties on 17 November 1978 for a term of three years (see exhibit TSC-1). Under clause 3.03 the company deposited three (3) months rental of RM90,000 with the applicant. By way of clause 7.02 the company is given the option to purchase the premises in the event the applicant, as the landlord, shall desire to sell the premises or any part thereof. In the purported exercise of the right under clause 7.02, the applicant *vide* letter dated 22 April 1989 gave the company one month's notice of option to purchase the premises.

Apparently the company appeared to have not responded to the offer of option to purchase. The applicant than issued a notice dated 10 June 1989 to that effect and at the same time giving the company one month's notice to vacate the premises by 1 August 1989 for the applicant to exercise its rights under clause 7.02 of TSC-1.

At the time the applicant gave the one month's notice to vacate, that is 10 June 1989 there was already a petition filed in the High Court, Johor Bahru on 15 May 1989 by Success Sport Company for the winding up of the company *vide* Companies (winding up) No. 28-67 of 1989 in which a winding up order was subsequently made on 7 December 1989 by the High Court. The premises was surrendered to the applicant on 19 December 1989 by the liquidator (see exhibit TSC-3). Apparently, the rents for the month of June to December were not paid and by way of notice dated 7 November 1990 (TSC-3), the applicant claimed the arrears at double rents which make a total sum of RM396,000 and purported to adjust the deposit sum of RM90,000 in which case the sum due should be RM306,000. How in TSC-3 the figure of RM429,000 was arrived at for all arrears due, I do not know. Be that as it may, the applicant is now claiming a sum of RM 339,000 from the liquidator as arrears of rental due to it from the company. On the other hand, the liquidator filed notice of originating motion No. 25-13-92 dated 2 April 1992 against the application (respondent in the case) praying for refund of the deposit of RM 90,000. The originating motion of the liquidator, as agreed, was stood down pending the disposal of this originating motion.

There are two issue for the consideration of the Court, *viz*-

(1) Whether the applicant is entitle to forfeit the deposit of RM90,000 towards the payment of the arrears of rental.

(2) Whether the applicant can claim for the arrears of rental from the liquidator by way of this originating motion.

Issue (1)

It cannot be disputed that the deposit of RM90,000 is the money of the company. The use of the word 'adjust' in TSC-3 in respect of the deposit money is in actual fact a forfeiture to cover for the arrears of rental due to the applicant (see s. 3.03 of TSC-1).

In the circumstances the first question for me to consider is the whether applicant is a secured creditor. According to s. 4 (1) of the Civil Law Act 1956, brankruptcy rules under the law of bankruptcy shall apply to the winding up of any company under any law from time to time in force relating to companies as to the respective rights to secured and unsecured creditors with respect to the estates of persons adjudged bankrupt. Under s. 2 of the Bankruptcy Act, 1967 'secured creditor' means "a person holding a mortgage, charge or lien on the property of the debtor...as a security for a debt due to him from the debtor...". Now 'property' under the same section, "includes money,...". As the sum of RM90,000 is a deposit under the tenancy agreement (TSC-1), in my view, it could not properly come within the meaning of mortgage, charge or lien and therefore the Applicant cannot be considered as "a secured creditor". In that event the Applicant does not come within s. 108 of the Companies Act, 1965 ("the Act").

As the disposition of the deposit was made after the commencement of the winding up, such disposition is void unless the Court orders otherwise. (See s. 223 of the Act). In the circumstances, the applicant has no right to forfeit the deposit as to do so would amount to undue preferential payment to creditors under s. 293 of the Act. Likewise, s. 224 of the also provides that any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.

Issue (2)

The claim of the arrears of rental at double the rents, in my view, would amount to a claim for damages for breach of contract. The moment the applicant claimed for damages, the applicant becomes a creditors. In that event the applicant should be in the same rank as any other creditors and any payment to it would be considered as payment to preferential creditors. In the circumstances, the applicant - as provided by r. 86 of the Companies (Winding-Up) Rules, 1972, is not prejudiced or its right as landlord is not affected to claim payment from the liquidator for arrears of rental like any other creditors by proving its debt. This can be done by the applicant, as provided by r. 79, by delivering or sending to the liquidator an affidavit verifying the debt together with the prescribed fee.

In any event, it would seem clear that this originating motion was filed after the winding up order was made by the Court and thus would require leave of the Court under s. 226 (3) of the Act which reads -

> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except -
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> (a) by leave the Court, and
>
> (b) in accordance with such terms as the Court imposes.

As s. 226 (3) has not been complied with by the applicant, this originating motion, in my view, is not properly before the Court and should therefore be struck out.

In the circumstances this originating motion is dismissed with costs.